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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 154

154

WONG YANG SUNG,

Petitioner,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, UNITED STATES COMMISSIONER OF IMMIGRATION AND NATURALIZATION,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

In a *per curiam* opinion the Court of Appeals affirmed the order below discharging petitioner's writ of *habeas corpus* (R. 8). The opinion of the District Court is reported at 80 F. Supp. 235.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

The basic issue presented in this case is whether an alien is entitled to a fair hearing in a deportation case—whether he may be deported after a hearing before a layman who acts as prosecutor and judge—or whether the Administrative Procedure Act, 5 U. S. C. 1004, 1010 prescribes that such hearing be held before an independent hearing officer who is not buried in the prosecuting and investigatory phases of the immigration process.

Specifically, the issues are:

1. Whether the hearing accorded an alien in a deportation case is a hearing "required by statute" and as such subject to the provisions of the Administrative Procedure Act (5 U. S. C. 1004-c) which require that hearing officers shall not be subject to the supervision of officials engaged in investigative or prosecuting functions.

2. Whether hearing officers in deportation proceedings are required to be appointed pursuant to the Administrative Procedure Act (5 U. S. C. 1010) and assigned to hearings in rotation.

3. Whether deportation proceedings are exempt from the terms of the Administrative Procedure Act by reason of the fact that they are "specified classes of proceedings . . . before . . . officers specially provided for by or designated pursuant to statute." (5 U. S. C. 1006).

Scope of Issues

The decision on the issues presented herein will not only affect the life and destiny of the petitioner who entered

the United States in 1946 (R. 2) but it will also control the type of hearing accorded to an alien resident in the United States for 35 years, married to an American citizen and the father of an American child (See *Potash* v. *Clark*, #366 Supreme Court, October, 1949). The decision herein will control hearings before the Post Office Department in mail fraud cases (*Bersoff et al.* v. *Donaldson*, 174 Fed. (2d) 494 (1949)) and hearings involving public convenience and necessity before the Interstate Commerce Commission. Also affected will be hearings of the Federal Communications Commission on the modification *vel non* of an outstanding licensee's facilities and proceedings of the Securities and Exchange Commission revoking an exemption (See Brief *Amicus Curiae* for Riss & Company, Inc.)

Statutes Involved

Section 16 of the Immigration Act of February 5, 1917, as amended, 39 Stat. 885, 8 U. S. C. 152 provides:

> ". . . The inspection . . . of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States under this section, shall be conducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry. . . . Said inspectors shall have the power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence."

Section 19 of the Immigration Act of February 5, 1917, as amended, 39 Stat. 889, 8 U. S. C. 155 provides:

> "At any time within five years after entry, any alien who at the time of entry was a member of one or

more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this chapter . . . shall, upon the warrant of the Attorney General, be taken into custody and deported. . . . In every case where any person is ordered deported from the United States under the provisions of this chapter, or of any law or treaty, the decision of the Attorney General shall be final."

Section 5 of the Administrative Procedure Act of June 11, 1946 (5 U. S. C. 1004) provides:

"In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, . . .

(c) *Authority and function of officers and employees.* The same officers who preside at the reception of evidence . . . shall make the recommended or initial decision . . . Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party or any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency."

Section 7 of the Administrative Procedure Act (5 U. S. C. 1006) provides:

"In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section——

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute."

Section 11 of the Administrative Procedure Act (5 U. S. C. 1010) provides:

"Subject to the civil-service and other laws to the extent not inconsistent with this chapter, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 1006 and 1007 of this title, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with sections 661-663, 664-669, 670-672, 673, and 674 of this title, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 667 of this title, and the provisions of section 669 of this title, shall not be applicable."

Statement

Petitioner is a citizen of China who entered the United States legally and has resided in the United States since his arrival on April 21, 1946. He was arrested in deportation proceedings on October 14, 1947, on a warrant issued the preceding day. Deportation proceedings were conducted in Washington, D. C., on December 11, 1947 and January 29, 1948, before a single immigrant inspector, Manuel E. Boteilho, a layman, who presented the government's case and also presided in a quasi-judicial capacity. Mr. Boteilho was subject to the supervision of the Officer-in-Charge of the Washington sub-office of the Immigration Service and a District Director who were and are engaged in the investigation and prosecution of aliens illegally in the United States.

Immediately following the hearing, Mr. Boteilho dictated on the administrative record findings of fact and conclusions of law recommending deportation on the ground that petitioner remained in the United States after legal admission for a period longer than permitted under the Immigration laws. (8 U. S. C. 214.) An order of deportation was entered and on appeal to the Board of Immigration Appeals the order was affirmed.

The petition for *habeas corpus* was filed on July 23, 1948, alleging that petitioner had been arrested, accorded a hearing, and ordered deported at the conclusion of said hearing. (R. 2). Petitioner asserted that his purported hearing was in conflict with the provisions of the Administrative Procedure Act in that:

> "(a) The presiding officer was responsible to and subject to the supervision of the respondents, their officers, employees, or agents who are engaged in the performance of investigation and prosecuting functions;

(b) The presiding officer was not qualified as a competent examiner subject to the Civil Service and other laws of the United States;

(c) The presiding officer was not assigned to the hearing in rotation."

It was alleged that the aforesaid violations rendered the hearing and proceeding void and that petitioner was therefore illegally detained. (R. 3). The answer and return of respondents did not deny the allegations of non-compliance with the Administrative Procedure Act but merely alleged that petitioner was held pursuant to a commitment issued by the Department of Justice (R. 6). On July 29, 1948, District Judge Holtzoff discharged the writ on the ground that deportation hearings were exempt from the Administrative Procedure Act under 5 U. S. C. 1006(a). In his opinion (80 F. Supp. 235) he states:

"Section 7 of the Administrative Procedure Act, U. S. Code, Title 5, Section 1006, on which the petitioner relies, requires statutory hearings to be conducted before an examiner appointed pursuant to the provisions of the Act. The hearing in this case, as is customary in all Immigration deportation proceedings, was conducted by an Inspector or Board of Inspectors of the Immigration Service. *If the requirements of the Administrative Procedure Act are applicable, the hearing was not properly conducted.*

"The Court, however, feels that the Administrative Procedure Act does not apply to hearings under the Immigration Laws, in the light of the following provision of Section (a) of Section 7 of the Administrative Procedure Act, and I quote:

'Nothing in this chapter shall be deemed to supersede the conduct of specific classes of proceedings in whole or in part by or before boards or other officers specially provided for by, or designated pursuant to statute.'

"Section 152 of Title 8 of the Immigration Law, which governs the authority and powers of Immigration Inspectors, provides that said Inspectors shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter, re-enter, pass through or reside in the United States, and where such action may be necessary, make a written record of such evidence. In the light of this provision it seems to the Court that deportation proceedings are within the exception specially specified in Section 7(a) of the Administrative Procedure Act, because it is 'a specific class of proceeding before officers specially provided for by, or designated pursuant to statute.'

In the light of this, the Court feels that immigration deportation hearings may be properly conducted by Immigration Inspectors and that the requirement as to hearing before specially appointed examiners as provided by the Administrative Procedure Act, does not apply." (Italics supplied.)

Although Judge Holtzoff's findings and order recited that evidence was taken in open court on the return date (R. 6-7) no evidence was in fact adduced and accordingly the record contains no transcript of any evidence.

On April 4, 1949, the Court of Appeals for the District of Columbia affirmed *per curiam* (R. 8).

Specification of Errors

The courts below erred in holding that:

1. Petitioner was not entitled to a hearing in conformity with Sections 5 and 11 of the Administrative Procedure Act (5 U. S. C. 1004, 1010) before independent hearing examiners assigned in rotation and not subject to the supervision or direction of officers engaged in the performance of investigative functions.

2. Section 7 of the Administrative Procedure Act (5 U. S. C. 1006) excepted deportation proceedings from the requirements of Sections 5 and 11 of the said Act.

3. Petitioner was not unlawfully detained and that he was not entitled to release from custody of respondents.

Argument

Petitioner contends that the deportation proceeding herein was unfair because it violated Sections 5 and 11 of the Administrative Procedure Act (5 U. S. C. 1004, 1010) which requires separation of functions and independent hearing examiners. Noncompliance with the applicable provisions of the Administrative Procedure Act was not denied by respondents in the courts below. Petitioner asserts that Sections 5 and 11 of the Administrative Procedure Act apply to deportation proceedings because:

I. Deportation hearings are required by statute as a matter of interpretation. The government's distinction under 5 U. S. C. 1004 between statutes which explicitly require a hearing and those which do by reason of constitutional interpretation is unsound and is not founded upon the correct construction of the statute nor the legislative history of the Administrative Procedure Act.

II. Section 7(a) (5 U. S. C. 1006(a)) does not remove deportation hearings from the operation of Section 5 (c) (5 U. S. C. 1004(c)) of the Administrative Procedure Act.

III. The hearing violated Section 11 (5 U. S. C. 1010) of the Administrative Procedure Act governing the appointment and tenure of hearing examiners. Section 7(a) does not remove deportation hearings from the operation of Section 11. Section 7(a) requires that hearing officers be specifically designated pursuant to statute to conduct

the proceedings involved and that the hearing officer be specially qualified.

(A) Deportation proceedings are not specially provided for before Immigrant inspectors. Section 16 of the Immigration Act of 1917 (8 U. S. C. 152) does not relate to the conduct of deportation hearings but merely to the investigation of aliens.

(B) Immigrant inspectors do not possess the qualifications contemplated by Section 7(a) (5 U. S. C. 1006 (a)).

(A)

The Deportation Process

In evaluating the deportation process, Professor Chaffee suggests that following criteria be observed. He states:

> "The most important question with any legislation which affects human happiness is, what kind of men administer its provisions? Are they a judge, a jury, a government official, a secret council, a star chamber? . . . An alien must expect to be expelled, if he furnishes legal cause, just as he must expect to be punished for an offense, but in each case we should be proud as citizens of a free land to furnish him the best legal machinery we can devise to ascertain whether or not the ground for governmental action really exists." (Free Speech in the United States, 1942, pp. 198, 200).

1. *The Qualifications for Presiding Inspectors.*

The immigrant inspector assigned to conduct a deportation hearing is known as a presiding inspector. 8 C. F. R. 150.6(b). He is not required to be an attorney at law, nor to have any trial, quasi-judicial or educational background. The only requirement is investigatory or interviewing experience. See *infra* p. 36.

2. *The Legal Machinery for Deportation.*

The initial step in a deportation case is the investigation of an alien by an immigrant inspector. The alien is questioned and asked to sign a sworn statement without any right to representation by counsel. 8 C. F. R. 150.1. This is followed by the issuance of a warrant of arrest, and incarceration unless there is an administrative grant of bail. 8 C. F. R. 150.5. The formal hearing follows.

Although provision is made for immigration hearings at which there may be an examining inspector and a presiding inspector, (8 C. F. R. 150.6(b) and (n)) such practice is not mandatory and except in rare instances one inspector presides as prosecutor and judge at a deportation hearing. This single inspector who presides at the hearing is also obligated by regulation to "cross examine the alien's witnesses and present such evidence as is necessary to support the charges in the warrant of arrest". 8 C. F. R. 150.6(b). Thus the presiding inspector is at one and the same time prosecutor and judge.

The presiding inspector may be an investigator one day and a quasi-judicial officer the next. He is not precluded from acting as investigator in other cases. He is only precluded from so acting in the same case. 8 C. F. R. 150.6 (b). He is subject to the ~~immediate~~ jurisdiction and control of a District Director who is charged with the duty of investigations under the Immigration Laws (8 C. F. R. 60.25), and authorized to direct the arrest of aliens illegally in the United States. 8 C. F. R. 150.3.

The procedure followed by the presiding inspector at a deportation hearing is in part prescribed by regulation. 8 C. F. R. 150.6. He is required to prepare a summary of the evidence and proposed findings of fact, conclusion of law, and a proposed order. 8 C. F. R. 150.7. In making these determinations, the presiding inspector's evalua-

tion of the facts, exercise of discretion and conclusions of law are controlled by the following:

1. A confidential file or confidential reports which are kept concerning every alien and which are available only to employees of the Immigration Service. These confidential reports follow the record of the case when it is transmitted to the Commissioner and the Board of Immigration Appeals. They are not made available to counsel for the alien.

2. A volume of several hundred pages of secret and confidential directives known as "Operation Instructions."

3. A loose leaf book of several hundred pages published for the confidential use of the Immigration Service, and known as the "Immigration Manual."

Thus controlled, the presiding inspector's findings and recommendations for or against deportation are served on the alien and submitted in some cases to the District Director for the entry of an order, and in other cases through the District Director to the Commissioner of Immigration. 8 C. F. R. 150.11(e), 150.9. Appeal may be taken from the Commissioner's order to the Board of Immigration Appeals. 8 C. F. R. 90.3.

It therefore appears that in practice a deportation order is proposed by the presiding inspector and approved by the Commissioner or the Board of Immigration Appeals upon consideration of confidential material with which the alien has never been confronted and which is not a part of the record.

This is the star-chamber procedure by means of which an alien is "forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land." (*Fong Yue Ting* v. *U. S.* 149 U. S. 740).*

* This court recently acknowledged that deportation can be the equivalent of banishment or exile. *Delgadillo* v. *Carmichael*, 332 U.S. 388, 391; *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10.

(B)

Non-Compliance With Administrative Procedure Act

Section 5 of the Administrative Procedure Act (5 U.S.C. 1004) requires that in every case of adjudication required by statute, hearing officers shall not be responsible to officials engaged in investigatory functions and precludes such hearing officers from participating in investigatory or prosecuting functions in the same or a factually related case. Section 7(a) of the Administrative Procedure Act requires the appointment of examiners pursuant to Section 11 of that Act but this provision is not to be construed to supersede the conduct of specified classes of proceedings before officers specially provided for pursuant to statute.

1. *Non-Compliance with 5 U.S.C. 1004 and 1010.*

The Administrative Procedure Act requires that: "The separation of functions must be reflected in the rules of organization and procedure published pursuant to section 3(a)" of the Administrative Procedure Act. (P. 262 Legislative History of the Administrative Procedure Act, Senate Document 248, 79th Congress).

There is no dispute that the Immigration Service failed to comply with this mandate of the Administrative Procedure Act. Commissioner Carusi in an article appearing in the Monthly Review of the Immigration and Naturalization Service for February, 1947 acknowledges that the Immigration Service is an agency within the Act and admits that:

> "in most cases there is not a complete separation of functions, since the presiding inspector generally conducts the entire hearing and recommends the decision." (p. 103.)

It is equally clear and not disputed that the Immigration Service has not selected its presiding officers in conformity

with Section 11 of the Administrative Procedure Act. 5 U.S.C. 1010. Judge Holtzoff so ruled. (80 F. Supp. 235).

By its failure to deny non-compliance with the Administrative Procedure Act in its answer, the government has admitted petitioner's charges.

In contravention of Sections 5 and 11 of the Administrative Procedure Act, 5 U. S. C. 1004, 1010, deportation hearing officers:

1. Are responsible to or subject to the supervision or direction of officers engaged in the performance of investigative functions.

2. Engage in the performance of prosecuting functions and at the same time participate or advise in decisions in the same case.

3. Engage in investigative functions and participate or advise in decisions in factually related cases.

4. Perform duties inconsistent with their responsibilities as examiners.

5. Are not assigned to cases in rotation.

6. Do not receive compensation prescribed by the Civil Service Commission independently of recommendations or ratings of the Immigration Service.

If deportation proceedings are subject to the Administrative Procedure Act then the instant hearing was unfair and illegal.

In *Bridges* v. *Wixon*, 326 U. S. 135, this Court stated:

> "It was assumed in *Bilokumsky* v. *Tod*, 263 U. S. 149, 155 that 'one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law.' We adhere to that principle. . . . Here the liberty of an individual is at stake. . . . We are dealing here with procedural requirements prescribed for

> the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in the land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

In the instant case the procedural violation is not one of administrative regulation like the *Bridges* case, but of an affirmative Congressional mandate.

Sections 5 and 11 of the Administrative Procedure Act require an independent hearing officer, detached from the investigative and prosecuting functions of the Immigration Service and responsible solely to the Civil Service Commission. An officer not so detached and appointed as required is disqualified. If it is found that the provisions of 5 U.S.C. 1004 or 5 U.S.C. 1010 have been violated, then the hearing was conducted before a disqualified officer and it, as well as the deportation order based thereon, was of no effect. 5 U.S.C. 1008, Senate Document 248 p. 274.

2. *Basis of Non-Compliance.*

Section 5 of the Administrative Procedure Act applies to adjudications "required by statute to be determined after opportunity for an agency hearing."

The government appears to be unable to decide whether or not deportation hearings are statutory.

On the ground that the deportation statute (Section 19 of the Immigration Act of 1917) "does not require an adjudication 'to be determined on the record after opportunity for an agency hearing' it was concluded by the Immigration and Naturalization Service, with the approval of the Department of Justice, that the adjudication requirements of the Administrative Procedure Act were not intended by Con-

gress to apply to the immigration statutes providing for deportation of aliens unlawfully in the United States" (*House Report 2140, 80th Congress,* 2d Session).

In testimony before the Senate Subcommittee on Immigration on S. 2755, 80th Congress, on June 9, 1948, the General Counsel of the Immigration Service, the Assistant Commissioner of Immigration Service and the Attorney General's office urged the enactment of a bill to exempt the Immigration Services from the provisions of the Administrative Procedure Act. These witnesses explained that deportation hearings were not being conformed to the Administrative Procedure Act because the hearing was one required by law and not by statute. (Pp. 4-6, 11-12, 21-22 of Testimony on file with Senate Immigration Subcommittee.) David Reich, representing the Attorney General, stated as follows (at p. 12):

> "In deportation proceedings, as has been stated by Mr. Savoretti (Assistant Commissioner of Immigration) and Mr. Winings (General Counsel), there is no requirement by statute for a hearing."

This was the contemporaneous administrative construction given to the Administrative Procedure Act by the Attorney General and the Immigration Service.

Nevertheless in the instant case the government urged and District Judge Holtzoff found that deportation was a proceeding before an officer "specially provided for or designated pursuant to statute." This ruling could only be reached on the assumption that deportation hearings were statutory—otherwise the exemption of 5 U.S.C. 1006 would be inapplicable. (The correctness of this ruling will be discussed more fully in Point III). In its brief in the Court of Appeals (p. 7) the government declared:

> "It is plain from the wording of the statute itself (8 U. S. C. 152) that the examination and *hearing*,

granted aliens arrested under the Immigration Act shall *by virtue of the express provisions of the Immigration Act* be conducted by immigrant inspectors."

At the same time, the Government also contended that the requirement of a hearing in deportation "is one which has evolved by judicial decision applying customary concepts of due process. Thus, the hearing is one 'required by law' rather than one 'required by statute'" (p. 13, Brief in Court of Appeals).

I

Deportation Hearings Are Subject to the Limitations of 5 U.S.C. 1004(c) Requiring Separation of Functions

(A) *Deportation hearings are required by statute.*

The immigration statutes do not in specific terms set forth the hearing procedure to be followed in a deportation case. Section 19 of the Immigration Act of 1917 (8 U.S.C. 155) merely states that an alien shall be taken into custody and deported. However the same statute specifically recognizes that hearings are required. Section 20 of the Immigration Act of 1917 (8 U.S.C. 156) provides for the release of an alien on bond conditioned that "such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody."

It is the contention of petitioner that deportation hearings are subject to Sections 5 of the Administrative Procedure Act (5 U.S.C. 1004) because the hearings are required by statute as the term is used in that Act. The Supreme Court has held that the immigration statutes are to be construed to require a hearing on the record to adjudicate whether an alien is deportable.

Japanese Immigrant Case, 189 U. S. 86;

Kwock Jan Fat v. *White*, 253 U. S. 454;
Bridges v. *Wixon*, 326 U. S. 135.

This construction of the statute follows both the requirement of due process and the *Congressional intent*. In the *Japanese Immigrant* case, *supra*, at 100, 101, the court said:

> "But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. . . . Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.
>
> "*This is the reasonable construction of the acts of Congress here in question.* . . . In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution." (Italics supplied.)

In *Bridges* v. *Wixon*, *supra*, the court stated:

> "As construed and applied in this case, *the statute calls* for the deportation of Harry Bridges after a fair hearing" (at p. 160).

In *Low Wah Suey* v. *Backus*, 225 U. S. 460, 472 in considering the Deportation statute of 1907, which was similar to the act now before this Court, it was said:

> "Considering the summary character of the *hearing provided by statute* and the rights given to counsel in

the rules prescribed, we are not prepared to say that the rules are so arbitrary and so manifestly intended to deprive the alien of a fair though summary hearing as to be beyond the power of the Secretary of Commerce and Labor under the authority of the statute."

In *American Power Co.* v. *S. E. C.*, 329 U. S. 90, the Supreme Court stated with reference to the Public Utility Holding Company Act:

> "That the statute does not expressly insist upon what in fact has been given the security holders is without constitutional relevance under the circumstances. Wherever possible, statutes must be interpreted in accordance with constitutional principles. Here, in the absence of definite contrary indications, it is fair to assume that Congress desired sec. 11(b) (2) be lawfully executed by giving appropriate notice and opportunity for hearing to all those constitutionally entitled thereto. See the Japanese Immigrant Case, 189 U. S. 86, 100-101 (at p. 108)".

In *Eisler* v. *Clark*, 77 F. Supp. 610, Judge Goldsborough held that Section 11 of the Administrative Procedure Act applied to deportation, stating:

> "The courts have read due process into the Act, and due process means a hearing, and . . . therefore hearing is an integral part of *the Deportation Act;* in fact, just as much as if the Act itself in words stated that a hearing should be held."

(B) *There is no distinction under Section 5 of the Administrative Procedure Act between statutes explicitly requiring a hearing and those requiring hearing by interpretation.*

As noted above, Section 20 of the Immigration Act of 1917 (8 U. S. C. 156) explicitly recognizes that a hearing is to be held in deportation proceedings. Nevertheless, it has been the government's position that the statute must ex-

plicitly require a hearing to be subject to Section 5 of the Administrative Procedure Act.

1. If the deportation statutes did not require a hearing they would be unconstitutional. *Japanese Immigrant* case, *supra*. It would seem strange that Congress should require the application of the Administrative Procedure Act to cases where a statute *in haec verba* required a hearing but not to cases where constitutional interpretation of the statute requires a hearing. Respect for the law does not thrive upon such capricious interpretations. *Delgadillo* v. *Carmichael*, 323 U. S. 388, 391.

The word "statute" when used in a federal enactment includes "Constitution."

A. F. L. v. *Watson*, 327 U. S. 582;
Phillips v. *U. S.*, 312 U. S. 246;
Hamilton v. *University of California*, 293 U. S. 245;
King Mfg. Co. v. *Augusta*, 277 U. S. 100, 103.

2. Significantly the Attorney General's Manual on the Administrative Procedure Act states that a statutory requirement of determination on the record may be implied from judicial interpretation (pp. 42, 43.) Section 5 of the Administrative Procedure Act covers adjudications "required by statute to be determined on the record after opportunity for an agency hearing." The words "required by statute" precede the words "on the record" and "agency hearing" and obviously if the requirement of a record may be implied by statutory interpretation so may the requirement for a hearing. There is nothing in the legislative history to support the conclusion that a differentiation was intended. (See Hearings on S. 674, 675, 918, 77th Congress, 1st Sess. p. 1456 which indicates that the two requirements of (1) agency hearing and (2) the record were intended to supplement each other.)

3. Where the framers of the Administrative Procedure Act intended to require express provisions in a statute, they employed language to accomplish such purpose. Thus in 5 U. S. C. 1009(c) they provided:

> "Except as otherwise *expressly required by statute*, agency action otherwise final shall be final for the purposes of this subsection." See *United States* v. *Cooper Corporation*, 312 U. S. 600 (1941).

4. The legislative history of the Administrative Procedure Act confirms the fact that Congress intended to cover deportation hearings, *i. e.* hearings required by statute although not required by the express terms of the statute.

In considering the legislative history the following conclusion is reached in 49 Columbia Law Review 75 (1949):

> "Although the Immigration Acts do not in terms so provide, the requirement of a hearing in deportation cases has been read into them by the courts to satisfy the constitutional requisites of due process of law. It has also been stated that the decision to issue a deportation order must be rendered on the record. Therefore, the applicability to deportation of the adjudication sections in question depends on whether the phrase 'by statute' as employed in the Act means *explicitly by statute* or *by statute as construed by the courts*.
>
> "Examination of the legislative history of the phrase reveals some disagreement as to its proper interpretation. Contrary to the position taken by the Attorney General that the strict construction was the one intended, the House Committee on the Judiciary stated: 'A statute may, in terms, require (an) . . . order to be made upon the record of a hearing, or in the usual case be interpreted as manifesting a Congressional intention so to require.'" [Citing H. R. Rep. No. 1980, 79th Cong. 2 Sess. 51 n. 9 (1946).]
>
> See also: Senate Document 248, 79th Congress 1st Sess. p. 285 note 9.

By this language of the House Judiciary Committee it appears clear that Congress not only included under 5 U. S. C. 1004 hearings required by statute *in haec verba* but also hearings which were required as a matter of statutory construction. It would therefore appear to be plain that deportation hearings are under the Administrative Procedure Act and particularly within section 5. The hearing herein was therefore in violation of law.

(C) *Section 5 of the Administrative Procedure Act does not exclude deportation hearings but only exempts non-statutory hearings granted as a matter of grace.*

For more than ten years prior to the passage of the Administrative Procedure Act legislation was under consideration to prescribe fair hearing procedures before administrative agencies. In 1939 the President approved the appointment of the Attorney General's Committee on Administrative Procedure. This committee studied the various administrative agencies of the government including the Immigration and Naturalization Service. (Senate Document No. 248, 79th Congress 2nd Session, p. 245).

The study of the Immigration Service is contained in a mimeographed pamphlet prepared in 1940 by Professors Marshal Dimock of the University of Chicago, Henry Hart of Harvard and John McIntire of George Washington. This pamphlet entitled "The Secretary of Labor's Committee on Administrative Procedure, (The Immigration and Naturalization Service)" stated and recommended with reference to deportation proceedings at pp. 78-81:

> "The right to an unbiased tribunal is one of the most obvious and elementary aspects of the basic right to a fair hearing. . . . We strongly recommend that the Department follow the example of other federal agencies in encouraging independence and detachment in presiding inspectors. . . . We recommend that the

> presiding inspectors be relieved of their present duties of presenting the case against aliens and be confined entirely to the duties customary for a judge. . . . We fully appreciate the adoption of this recommendation would add somewhat to the cost of administration. But we do not think the added cost would be so serious that it might be regarded as prohibitive. . . . We are deeply persuaded that fairness and wisdom alike require the expenditure, whatever it might be . . ."

During the 77th Congress, First Session, several administrative procedure bills were introduced. Two such bills, S. 674 and S. 918 required administrative agencies to grant hearings where the law previously prescribed none.

Various agencies including the Immigration Service objected to the bill on this ground. The Federal Security Agency, the Treasury, and the Federal Deposit Insurance Corporation were opposed to the requirement of *formal hearing procedures* to cases which under the law were and are now conducted informally and in which hearings are not legally required. (Senate Hearings on S. 674, 675, 918, 77th Congress, First Session, pp. 1390, 251, 148-149, 791-792.)

The Immigration Service approved the application of the independent hearing examiner provision of S. 675 to deportation and exclusion cases.

Major Schofield, head of the Immigration Service, testified on April 30, 1941 before a Senate Judiciary Sub-Committee as follows with reference to S. 675:

> "Through section 301, it applies its hearing-commissioner system only to cases where by law formal procedures are now required. In other words, as we read it, its requirements apply only to deportation and exclusion cases. . . . We think that the hearing-commissioner system would improve our present procedures to a considerable extent without stultifying the administration of the laws. . . . Now we use inspectors to hear cases who are engaged in other activi-

> ties when not acting as presiding officers. Both S. 675 and S. 674 would prevent this and would require a staff of hearing commissioners devoted solely to hearing and deciding cases." (pp. 571, 575, Hearings on S. 674, 675, 918, 77th Cong. 1st Sess.)

He objected however to S. 674 and 918 insofar as those bills required "formal adjudicatory procedures for the hearing and decision of cases" other than deportation or exclusion. (Hearings on S. 674, 675, 918, 77th Congress, First Session, pp. 564-567.)

In a statement submitted by Acting Attorney General Biddle, it was suggested that S.675 be amended so that the bill would apply to hearings required by statute or constitution instead of to hearings required by law. He clearly indicated that the purpose of the amendment was to exclude nonstatutory hearings granted voluntarily by an agency and established solely by regulation. He stated:

> "In some cases certain agencies have ex gratia by regulations imposed upon themselves requirements of formal procedures though the applicable statute makes no such requirement. In order to exclude the possibility that such procedures come within Title III, the amendment is desirable." (Hearings on S.674, 675, 918 *supra*, p. 1456.)

The Administrative Procedure Act is confined to hearings "required by statute" and not to hearings "required by statute or constitution" as suggested by Mr. Biddle. The words "or constitution" were unnecessary. The constitution does not require a hearing in deportation cases. It is the statute as construed by the constitution which does.

The Final Report of the Attorney General's Committee on Administrative Procedure in Government Agencies (Senate Document 8, 77th Congress 1st Session, pp. 55, 56) recommended an independent hearing examiner system in government agencies and the separation of the adjudicating function from other administrative activities. The

minority of this Committee agreed with the principle of separation of functions but desired more sweeping exceptions. It specifically recommended an exemption in the adjudicatory procedural requirements in connection with the "admission or control of aliens." (Senate Hearings on S. 674, etc. pp. 1389-1390). This exemption was never adopted nor were attempts to secure immigration exemptions subsequent to the passage of the Administrative Procedure Act successful.

During the 80th Congress the Immigration Service actively sought the enactment of a bill to specifically exempt it from the application of the Administrative Procedure Act (H. R. 6652 and S.2755). Congress declined to approve this legislation. A bill is now pending in the 81st Congress to accomplish the same end (Section 5 of H. R. 10).

When the Administrative Procedure Act was enacted it contained no exemption for the Immigration Service. Section 2 of the Act, 5 U. S. C. 1001, excluded war functions, Section 5 (5 U. S. C. 1004) excluded military, naval and foreign affairs functions and other enumerated classes. The suggested exemption for the "admission or control of aliens" was therefore specifically rejected. The application of the Administrative Procedure Act to deportation proceedings, originally advocated by the Immigration Service itself and the requirement for independent examiners advocated by the Secretary of Labor's Committee were accordingly approved when the Administrative Procedure Act, Public Law 404, 79th Congress, was signed by the President.

Sub-Committee Chairman Francis E. Walter in charge of the bill in the House also indicated that the distinction was between statutory and nonstatutory hearings. He states:

> "The requirements of section 5 are thus limited to cases in which statutes otherwise require a hearing,

> because, *where statutes do not require an agency hearing*, the parties affected are entitled to try out the pertinent facts in court . . . The right of trial de novo in judicial cases where agencies do not proceed upon a statutory hearing will also be discussed in connection with section 10e." 32 *American Bar Association Journal*, 377, 380.

We submit that it appears from the foregoing that Congress did not intend to exempt deportation hearings, that it has specifically declined to entertain such exemption, that Congress did not intend to distinguish under 5 U. S. C. 1004 between hearings required by express statute and those required by statutory interpretation. The Immigration Service and the Department of Justice and others only objected to the requirements of the Administrative Procedure Act where statutes as expressly worded or as interpreted did not require hearings.

The distinction contemplated by 5 U. S. C. 1004 was merely between statutory hearings and nonstatutory hearings granted as a matter of grace. Section 5 of the Administrative Procedure Act is applicable to deportation proceedings and its provisions have been violated.

II

Section 7(a) of the Administrative Procedure Act Does Not Exempt Deportation Hearings from the Requirements of Section 5(c).

Section 5 of the Administrative Procedure Act requires that in cases of adjudications *required by statute* hearings shall be conducted in conformity with Section 7 of the Administrative Procedure Act. (5 U. S. C. 1004b).

Section 5(c) of the Act requires separation of investigatory and adjudicatory functions. It exempts the top men in any governmental organization by excepting "the agency or any member or members of the body comprising the agency." (Senate Document 248, pp. 262, 361).

In his Manual, on the Administrative Procedure Act, the Attorney General states at pp. 71-72:

> "The requirements of section 7 are closely integrated with those of section 5(c) (as to certain types of adjudication) and 8 . . . The first sentence of section 7(a) provides that 'There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises an agency or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or in part before boards or other officers specially provided for or designated pursuant to statute . . . *The last clause of the sentence is designed to permit agencies to continue to utilize hearing officers or boards 'specially provided for by or designated pursuant to statute' . . . Generally, whoever presides at the hearing (whether an examiner pursuant to section 11, a member of the agency or a special statutory board of hearing officer) is subject to the remaining provisions of the Act.* Sen. Rep. p. 21; H. R. p. 34 (Sen. Doc. pp. 207, 268). However, where a member of the agency acts as presiding officer, the exception in the last clause of section 5(c) applies, with the result that he is not disqualified, as an examiner would be, by previous participation in the investigation of the case." (Italics supplied).

Section 7(a) was not intended to cancel or reduce the application of Section 5(c). On the contrary it supplements it.

> "As heretofore stated in connection with sections 4 and 5, the bill requires no hearings unless other statutes contain such a requirement in particular cases of either rule making or adjudication. This section 7, therefore, is merely supplementary to sections 4 or 5 in the relevant cases." *Senate Document* 248 p. 206. See also: pp. 227, 252, 268.

Deportation proceedings are within the exemption of Section 7(a) of the Administrative Procedure Act only

on the assumption that such hearings are required by statute before specially designated officials of the Immigration Service. We do not believe that immigrant inspectors are such officials. (See *infra*, Point III). Nevertheless, it is clear whether or not immigrant inspectors are specially designated pursuant to statute to conduct deportation hearings, that they are subject to the prohibitions of Section 5 (c). They are not the agency or a member of the agency (5 U. S. C. 1001)—the only hearing officers specifically exempt by the Act from the operation of Section 5(c). If the Commissioner of Immigration presided at a deportation hearing, he alone would be exempt. (Senate Document 248, p. 262). The provisions of Section 7(a) were not designed to exempt hearing examiners from the requirement of Section 5(c) which contains its own exceptions. This is fortified by the legislative history of the Act.

In the Senate Committee Report of 1945, p. 21 (Senate Document 248, *supra*, p. 207) it is stated with reference to Section 7(a):

> "This subsection provides two mutually exclusive methods of hearing—by the agency itself (or one or more of its members) or by subordinate officials. *A third kind of hearing officer recognized in this subsection is one specially provided for or named in other statutes. Whoever presides is subject to the remaining provisions of the bill.*" (Italics supplied.)

And again in the House Committee Report of 1946 it is repeated with reference to all hearing officers recognized in Section 7(a) that:

> "Those who so preside are subject to the remaining provisions of the bill." *Senate Document 248, supra*, p. 268.

Significantly the Immigration Service considers exclusion proceedings within the exemption of Section 7(a) but

does not consider such exemption as removing it from Section 5. Exception from Section 5(c) is asserted in exclusion cases solely because of the exemption in Section 5(c) for initial licenses. Moreover, the Immigration Service concedes that it is an agency within the provisions of the Administrative Procedure Act and that it is subject to some of its provisions. (Monthly Review of the Immigration and Naturalization Service, February 1947, pp. 96,101). Nevertheless the opinion below would afford complete exemption to the Immigration Service. If it were intended to exempt the deportation process from all the provisions of the Administrative Procedure Act, the exemption would have been set forth in Section 2 (5 U. S. C. 1001) where general exemptions are provided. If it were intended to exempt statutory hearing officers from Section 5(c) it would have been set forth specifically in that section. We therefore submit that regardless of the application of 5 U. S. C. 1006(a) to the proceedings herein, 5 U. S. C. 1004(a) has been violated.

Point III

The Hearing Violated Section 11 of the Administrative Procedure Act and is Not Within the Exemption of Section 7(a).

The Immigration Service admittedly did not select the deportation hearing examiner herein in conformity with Section 11 of the Administrative Procedure Act (5 U. S. C. 1010). It can excuse this failure only upon the theory that the hearing was conducted pursuant to Section 7(a) (5 U. S. C. 1006a) by an officer specially provided for by or designated pursuant to statute.

> "In short unless the agency or its members or some specially qualified statutory officer hears the case, an examiner qualified under section 11 of this bill must do so." *Senate Document* 248, p. 364.

House Committee Report No. 1980, 79th Congress on the Administrative Procedure Act states:

> "The preservation of the 'conduct of specified classes of proceedings by or before boards or other officers specially provided by or designated pursuant to statute' is not a loophole for the avoidance of the examiner system; *it is intended to preserve only special types of statutory hearing officers who contribute some special qualifications,* as distinguished from examiners otherwise provided in the bill, and at the same time assure the parties fair and impartial procedure." *Senate Document 248,* p. 268 (Italics Supplied).

In his explanation of Section 7(a) Attorney General Clark stated on October 19, 1945:

> "The subsection is not intended to disturb presently existing statutory provisions which *explicitly* provide for certain types of hearing officers." *Senate Document 248,* supra, p. 227.

We submit that in the light of the foregoing, two requirements were contemplated to bring a case within the exemption of Section 7(a). First the hearing officer must be specifically designated pursuant to statute to conduct the proceeding, and secondly he must be a specially qualified officer.

(A) *Deportation Hearings are not Specially Provided Before Immigrant Inspectors.*

Immigrant inspectors are appointed pursuant to statute (8 U. S. C. 109) but deportation hearings are not a "specified class of proceedings before officers *specially* provided for or designated pursuant to statute," as the expression is employed in Section 7(a) of the Administrative Procedure Act.

The government has insistently contended in the instant case, in *Azzollini* v. *Watkins,* 172 F. (2d) 897, and in other

cases that deportation hearings are not *explicitly* required by statute but that "such hearings have evolved from well defined concepts of due process" (Brief, Court of Appeals, p. 17). In the *Azzollini* case it was asserted that: "The statute . . . nowhere even mentions a hearing. While a hearing is necessary in deportation cases, this requirement is one which has been evolved by judicial decisions based on concepts of due process rather than on statutory mandate." (Brief, Court of Appeals, p. 11). We agree with the government's contention that a deportation hearing is not in *haec verba* required by the statute. We believe however that it is required by the statute as a matter of judicial interpretation. Because the statute requires hearings as a matter of interpretation rather than explicitly, it cannot *specially* or *explicitly* provide for deportation hearing officers. The Attorney General and the House Committee were definite in their insistence that the Section 7(a) exemption of the Administrative Procedure Act applies only to "proceedings before officers *specially* provided" or to "statutory provisions which *explicitly* provide for certain types of hearing officers" *Senate Document 248, supra,* pp. 227, 268. Unlike Section 5, the Section 7(a) exemption by its very terms only applies where another statute *specially* provides for hearing officers.

Judge Holtzoff in the instant case (80 F. Supp. 235) and the Second Circuit in *Azzollini* v. *Watkins,* 172 F. (2d) 897, found that in a deportation hearing the immigrant inspector "is 'specially provided for or designated pursuant to statute', that is, by Sec. 16 of the Immigration Act of 1917, 39 Stat. 874, 885-886, 8 U. S. C. Sec. 152" and it was concluded that deportation proceedings were removed from the operation of Section 5(c) and 11 of the Administrative Procedure Act. Reference to the records and briefs in both cases will disclose that the deportation process and the Administrative Procedure Act was not

fully explained nor understood by those courts. Assuming the applicability herein of Section 7(a), we believe that Section 5(c) of the Administrative Procedure Act nevertheless applies. (Points I and II, *supra.*)

We submit that Section 16 of the Immigration Act of 1917 does not specially provide for deportation hearings nor for deportation hearing officers.

The initial step in a deportation case is the investigation of an alien by an immigrant inspector. This is followed by the issuance of a warrant of arrest and the formal deportation hearing.

8 C. F. R. 150.1, 150.3, 150.4a;
Steinberg, The Warrant Hearing in a Deportation Proceeding, Federal Bar Assn. Journal, July, 1945.

Detailed provisions for the conduct of a deportation hearing are contained in 8 C. F. R. 150.6.

Section 16 of the Immigration Act of 1917 (8 U. S. C. 152) does not provide for the *procedure* at the *formal deportation hearing.* Assuming that it applies to deportation at all, it merely grants authority to immigrant inspectors to *investigate* or *inspect.*

Section 16 of the Immigration Act of 1917 provides:

> "The inspection, other than the physical and mental examination, of aliens, including those *seeking* admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States *under this section,* shall be conducted by immigrant inspectors . . . . All aliens *arriving* at ports of the United States shall be examined by at least two immigrant inspectors . . . Immigrant inspectors are hereby authorized and empowered to board and search for aliens any vessel, railway car, or any other conveyance, or vehicle in which they believe aliens are being brought into the United States. *Said inspectors shall have*

the power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence; . . . All aliens *coming to* the United States shall be required to state under oath the purposes for which they come, the length of time they intend to remain in the United States, whether or not they intend to abide in the United States permanently and become citizens thereof, and such other items of information regarding themselves as will aid the immigration officials in determining whether they belong to any of the excluded classes . . . Every alien who may not appear to the examining immigrant inspector *at the port of arrival* to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry . . . The decision of an immigrant inspector, if favorable to the admission of any alien, shall be subject to challenge by any other immigrant inspector . . ." (Italics supplied).

It is doubtful that this section was intended to apply to any phase of the deportation process. *Contra, Graham* v. *U. S.*, 99 F. 2(d) 746. The section covers exclusion proceedings. The jurisdiction of immigrant inspectors and this section is defined in the first sentence to cover aliens seeking admission for temporary purposes or for residence.

Indeed, the section expressly provides that if the evidence thus developed does not establish beyond doubt the right of the alien to land, the alien shall be detained for examination before a Board of Special Inquiry. The conduct of the examination hearing before such Board is prescribed in detail in Section 17 of the Immigration Act of 1917. (8 U.S.C. 153.)

In any event, assuming that the section covers the deportation process, it relates solely to the authority of inspectors to investigate or to take a preliminary statement in the

initial informal state of the deportation process (8 C. F. R. 150.1 (a-c)).

In the *Report of the Secretary of Labor's Committee on Administrative Procedure* (The Immigration and Naturalization Service) by Marshall Dimock, Henry Hart and John McIntire (1940) at page 66 it is concluded:

> "*Basis of inquisitorial power*—Sweeping authority to question suspected aliens, *independently of any formal proceedings* against them, is conferred upon immigrant inspectors by Section 16 of the Act of 1917. . . In the unsatisfactory fashion characteristic of the immigration statutes, however, this authorization appears in the middle of a long paragraph dealing primarily with procedure at the border, and some doubt may exist as to whether it refers to *inquiries* concerning the rights of other than entering aliens. The Department, however, has taken the view that it does, and we are satisfied that such a view is correct." (Italics supplied.)

Section 16 of the Immigration Act of 1917 refers to the "inspection of aliens, the power of inspectors to administer oaths", "to take and consider evidence", "to make a written record of such evidence where necessary and to investigations . . . conducted by an immigrant inspector." Not a word is said about the conduct of deportation hearings as in the case of exclusion "hearings" before Boards of Special Inquiry (39 Stat. 887; 8 U.S.C. 153). The taking of evidence in the form of a preliminary statement from the alien (8 C. F. R. 150.1) is obviously not a provision for the conduct of a formal deportation hearing. (8 C. F. R. 150.6)

It seems clear that the Attorney General and the Immigration and Naturalization Service have never regarded this section as one relating to formal deportation proceedings. In promulgating regulations concerning the arrest, deportation and conduct of hearings thereon (Part

150, Title 8, Code of Federal Regulations), the Attorney General does not cite Section 16 of the Immigration Act of 1917 as forming the statutory basis or authority for the regulations (see Note following 8 C. F. R. 150.1(f)). On the other hand, regulations concerning the inspection and investigation of *arriving* aliens all refer to Sec. 16 of the Immigration Act of 1917 as statutory authority for their issuance. (See, e. g., 8 C. F. R. 110.7 to 110.11, 110.41, 110.46, 110.49, 110.50; 8 C. F. R. 12.2; 8 C. F. R. 118.6; 8 C. F. R. 120.22 to 120.24; 8 C. F. R. 130.4, 130.6, 130.8; 8 C. F. R. 140.1)

The conclusion of the Secretary of Labor's Committee that 8 U. S. C. 152 refers to the informal preliminary state of the deportation process is therefore well taken. It conforms to the government's insistent claim in the courts below that deportation hearings are not explicitly provided for by statute. This section thus cannot be made the basis for an exemption under 5 U. S. C. 1006. Section 16 (8 U. S. C. 152) does not provide for the conduct of a formal deportation hearing before an immigrant inspector and it has not heretofore been so interpreted by the Immigration Service.

(B) *Immigrant Inspectors are not Specially Qualified Statutory Officers.*

The exemption of Section 7 of the Administrative Procedure Act, 5 U. S. C. 1006 "does not mean that agencies are authorized—whether pursuant to the express authority of other statutes or not—to avoid the examiner system—set up in this bill . . . by assigning general employees or attorneys to hear cases individually or as boards. In short, unless the agency or its members or *some specially qualified statutory officer* hears the case, an examiner qualified under section 11 of this bill must do so. (Congressman Walter, Senate Document No. 248, 79th Congress, 2nd Session, p.

364. See also: Page 268 and Attorney General's Manual on the Administrative Procedure Act, pp. 71-72.)

56 Yale Law Journal 701 states:

> "'The committee reports' indicate that the exemption should be strictly construed, and in particular that statutory provisions authorizing the use of employees or attorneys generally should not be considered authorization for exemption. However, some statutory boards listed by the Attorney General in the Senate Report as examples of the exempted class seem to fall within the group which the reports indicate is not exempted. The apparent conflict can only be resolved on the grounds that the statutes setting up these boards did not authorize the use of employees generally but rather specified that their members should be selected from among eligible employees designated as such by the agency head."

The article concludes that the Immigration Service is required to comply with Section 11 (5 U. S. C. 1010) and appoint independent examiners in deportation cases.

The qualifications of immigrant inspectors are set forth in Announcement No. 4-71-1 (1949) of the Board of U. S. Civil Service Examiners. They are not required to be lawyers or to have any educational background but merely investigatory or interviewing experience. In this connection the provisions of 8 C. F. R. 60.27 should also be noted.

> "60.27. *Authority of patrol inspectors, special inspectors, naturalization examiners, and other officers to act as immigrant inspectors.* All persons serving under appointment heretofore or hereafter made as patrol inspectors, special inspectors, naturalization examiners, or other officers of the Immigration and Naturalization Service of a higher grade than patrol inspector, special inspector, or naturalization examiner are hereby designated immigrant inspectors without additional compensation. The work as immigrant inspectors shall be arranged by supervisory officers so as

not to interfere substantially with the performance of the duties of the other positions."

The duties of patrol inspectors are described in announcement No. 101 of the United States Civil Service Commission, issued June 1, 1948. This announcement describes their work as follows:

> "Patrol Inspectors will be members of the Immigration Border Patrol, a mobile uniformed enforcement organization; incumbents will be required to perform patrol duties on foot, by motor vehicle, by airplane, or on horseback. They will receive physical training equivalent to that given to commando units of the Armed Forces."

Although patrol inspectors are required to pass an aptitude test, there is no educational requirement for the position. It will therefore be observed that patrol inspectors, naturalization examiners and all employees other than clerks and stenographers may be utilized by the Immigration Service to conduct hearings.

The Attorney General's Manual on the Administrative Procedure Act (1947) at p. 72 acknowledges:

> "A statutory provision which merely provides for the conduct of hearings by any officers or employees the agency may designate, does not come within the exceptions so as to authorize the agency to dispense with hearing examiners appointed in accordance with section 11. H. R. Rep. p. 34 (Sen. Doc. p. 268)."

In testimony before the Senate Subcommittee on Immigration on S. 2755 (June 9, 1948), Ashley Sellers representing the American Bar Association pointed out that the exemption of Section 7 contemplated the appointment of a special type of responsible official rather than employees generally (pp. 93 *et seq*).

Under its regulations the Immigration Service may designate border patrol men as immigrant inspectors to conduct hearings. They may select officials outside the government to so act as they did in the *Bridges* case. Any person, in or out of the government, may be designated an immigrant inspector to sit on a Board of Special Inquiry. 8 C. F. R. 60.29(c). Immigrant inspectors need not be lawyers, need not be trained in the law or in immigration matters in order to be designated as a hearing officer. If hearings conducted by immigration inspectors fall within the exemption of 5 U. S. C. 1006, then a loophole has been provided for the examiner system.

It is therefore submitted that the exemption of Section 7(a) is inapplicable and that the respondents are required to appoint hearing examiners in conformity with Section 11 of the Administrative Procedure Act.

Conclusion

For approximately sixty years, the deportation process has been a blot upon our traditional concepts of Anglo-American jurisprudence. The Final Report of the Attorney General's Committee on Administrative Procedure in Government Agencies states that:

> "A man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions." (*Senate Document No. 8, 77th Congress, 1st Session*, p. 56).

The Secretary of Labor's Committee on Administrative Procedure (1940) urged that prosecuting and adjudicatory functions in deportation proceedings be separated. The commingling of these functions has been criticized and condemned by educators, immigration attorneys, government officials and by the judiciary.

Van Vleck, The Administrative Control of Aliens (1932), pp. 247, 46, 67;

The Secretary of Labor's Committee on Administrative Procedure, supra;

5 *National Commission on Law Observance and Enforcement* (1931);

Wasserman, The Challenge of our Immigration Laws, Journal of Legal and Political Sociology (Fall, 1944) p. 115.

Clark, Deportation of Aliens (1931);

Chaffee, Free Speech in the United States (1942) p. 198-201;

Bosny v. *Williams*, 185 Fed. 598.

Nevertheless, like a character transposed from Alice in Wonderland,* the immigration officer today plays the part of prosecutor-judge and jury.

If the most depraved criminal were convicted before an official who performed the functions of prosecutor and judge, his jail sentence would be set aside. Yet the most deserving alien is separated from his home, family and friends and is sentenced to banishment in distant lands by a prosecutor who sits as judge. Is it too much to expect that in such proceedings the quasi-judicial-hearing officer be independent and divorced from investigatory and prosecution functions?

We submit that the blot on our traditional concept of Anglo-American justice spilled by deportation procedures of former years has been removed by the Administrative Procedure Act.

The hearing herein was conducted by a disqualified official and was a nullity. Accordingly, petitioner is illegally

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* "I'll be judge. I'll be jury"
Said cunning old Fury;
"I'll try the whole cause,
And condemn you to death."

detained and the writ of habeas corpus should have been granted.

Respectfully submitted,

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